Supreme Court, U.S.
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No. 97-557

In The

Supreme Court of the United States

October Term, 1997

CHRISTOPHER PANGALOS,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER STATEMENT OF THE CASE

Respondent, in its counterstatement of the case, identifies perceived omissions and misstatements of fact contained in petitioner's original statement of the case.[1] On the contrary, it is respondent's counterstatement of the case that contains allegations of "uncontroverted" fact which are refuted in the record.

Respondent states that it offered to purchase and install mobile toilet facilities in petitioner's personal vehicle. If petitioner's vehicle was not suitable to house such facilities, respondent offered to reimburse petitioner for the cost of a portable toilet. *See* Respondent's Brief in Opposition at p. 3. These statements are subject to refutation in the record in that petitioner testified at his deposition that after he priced a sanitary toilet facility at a cost of $450, this was rejected by respondent as too costly. Petitioner testified that respondent refused to provide a sanitary toilet or wash up facility after being advised that such facility would cost at least $450. Therefore, the statement by respondent in its brief regarding the reasonableness of its offer of accommodation would have been a question of fact for determination by the jury.

Respondent places emphasis upon petitioner's moving to Kentucky in the Spring of 1994. Petitioner testified that this move was necessitated due to his worsening economic situation. Throughout 1994 and 1995 petitioner remained ready, willing, and able to resume employment in the Philadelphia area either

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1. All factual findings upon which the lower court based its decision to grant summary judgment are contained in its Opinion, reprinted as Appendix B to the Petition for Writ of Certiorari. Petitioner has presented to this Honorable Court all relevant facts, both in his Statement of the Case and in the lower court opinion, which are material to the Petition for Writ of Certiorari.

at respondent's home office in Fort Washington, Pennsylvania, or in any other office setting that would provide him with access to bathroom facilities. Throughout petitioner's course of dealings with Donald Carter, Eve Young, and other employees of respondent, he consistently expressed his interest in being transferred to a position which would accommodate his disability. Included among the alternatives was a transfer to the Kentucky area in which petitioner would supply the costs of opening an office as a Prudential Sales Agent. At no time did petitioner reject any offers of transfer in the Philadelphia area or any other part of the United States. In fact, no such offers were made. Petitioner's move to Kentucky was immaterial in terms of his ongoing efforts to secure alternate employment with Prudential. He maintained telephone and written contact with Mr. Carter, Ms. Young, and other employees of respondent throughout the period of time he lived in Kentucky.

Petitioner was on short-term disability leave from late 1993 through calendar year 1994. However, the contractual entitlement of petitioner to short-term disability leave did not affect in any manner respondent's legal obligations under the ADA to provide a reasonable accommodation. Throughout the later part of 1993, and in 1994 and 1995, petitioner had continually asked for reasonable accommodation, including transfer to a job position which could accommodate his disability. Petitioner's entitlement to short-term disability benefits under the terms of his employment contract, does not vitiate respondent's obligation to provide a reasonable accommodation to petitioner as an individual with a disability.

FURTHER REASONS FOR GRANTING THE WRIT

Respondent's argument that the issue presented by petitioner is not raised by the facts of this case is incorrect. This argument states that, ". . . it is uncontroverted that plaintiff was in fact

offered a reasonable accommodation, *viz*, a mobile toilet facility, that he rejected." Respondent's Brief in Opposition, p. 4. In fact, it is a controverted issue as to whether or not respondent offered a reasonable accommodation to petitioner. Petitioner testified at his deposition that once he quoted a price of $450 for a regular sized toilet without sanitary wash up facility, the respondent through Eve Young rejected the prospect as being too costly. Whether or not respondent ever unequivocally offered any sort of mobile or portable toilet facility is a question of disputed fact. Rather, the offer made by respondent was for a camping potty, or portable potty without any sort of wash up facility. As indicated by the lower court in its opinion,

> But the two proposals are alike in that they would, at best, provide only partial solution to the problem. It seems obvious that, in the course of his sales calls, plaintiff would not always have immediate access to either type of portable facility.

Petition for Writ of Certiorari, Appendix B at 8a.

Although the lower court stated as one of its four alternative holdings that respondent had offered a reasonable accommodation, it is apparent from the lower court's discussion of the efficacy of a portable toilet facility, that, in its opinion, it placed greater weight upon its alternative holding that no feasible accommodation existed which would enable petitioner to perform the essential duties of his job.

Therefore, squarely before the lower court was the obligation to consider whether or not transfer to another position would have been a reasonable accommodation. The lower court misstated the law by stating that defendant is not required to transfer plaintiff to another position. Petition for Writ of Certiorari, Appendix B at 7a. Because the lower court failed to

properly consider the availability of transfer as a reasonable accommodation and because it sub silentio placed the burden on petitioner to demonstrate the availability of a vacant position as a reasonable accommodation, the Petition for Writ of Certiorari should be granted.

The split among the circuit courts exists as demonstrated in the Petition. This Court's guidance is necessary to resolve the conflict and to effectuate the remedial purpose of the Americans With Disabilities Act.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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